STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 15, 2014
v OCTAVIOUS DEAN, Defendant-Appellant.	No. 313817 Wayne Circuit Court LC No. 12-003845-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v RAFEAL EMMANUEL DEAN, Defendant-Appellant.	No. 316101 Wayne Circuit Court LC No. 12-003845-FH

Before: STEPHENS, P.J., and SAAD and BOONSTRA, JJ.

PER CURIAM.

In these consolidated cases, defendants[1] appeal their bench trial convictions of assault with intent to do great bodily harm less than murder under MCL 750.84. For the reasons stated below, we affirm.

I. DOCKET NO. 313817

Defendant Octavious Dean[2] unconvincingly asserts that: (1) there was insufficient evidence to support his conviction; and (2) the trial court erred in scoring his offense under OV 3 and OV 7. We address each issue in turn.

[1] A third defendant, Demarco Brown-Sanders, also stood trial with the current defendants.

A. SUFFICIENCY OF EVIDENCE

Challenges to the sufficiency of the evidence are reviewed de novo. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). The evidence is considered in a light most favorable to the prosecution, and we determine whether a rational trier of fact could have found that every essential element was proven beyond a reasonable doubt. *Id.* at 196. Generally, circumstantial evidence and the reasonable inferences that can be drawn from that evidence can amount to sufficient evidence. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

During a bench trial, the judge must rely only on the evidence presented when determining guilt or innocence. *People v Simon*, 189 Mich App 565, 568; 473 NW2d 785 (1991). The trial court may make reasonable inferences that arise from the evidence of record, whether the evidence is direct or circumstantial. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990). Regardless of whether the defendant was tried by jury or the bench, this Court "will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 618-619; 751 NW2d 57 (2008).

"The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (emphasis omitted). When a fact-finder determines a defendant's intent, "minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *Kanaan*, 278 Mich App at 622.

Here, defendant wrongly maintains that, because the victim was not a credible witness, there is insufficient evidence to support the trial court's conclusion that he intended to do great bodily harm. Defendant's entire argument is merely an attack on the trial court's credibility determinations, a matter we do not consider. *Id.* at 618-619. Moreover, as the fact-finder, the court was free to credit some of the victim's testimony while discrediting other portions. See CJI2d 3.6(5). And the trial court heard sufficient evidence to establish the intent element of the crime. The victim and defendant began fighting, and during the course of the fight, the victim testified that defendant and three or four other men kicked, punched, and jumped on him as he lay on the ground, and he stated that this assault lasted for 20 minutes. The injuries victim suffered in the assault required significant medical attention, and he was treated for a fractured eye socket, broken nose, contusions, and broken ribs.

From this evidence, the trial court could reasonably infer that defendant acted with the requisite intent necessary to convict defendant under MCL 750.84. In addition, the court properly noted that when a group of men beat one individual, the group's goal is to cause bodily harm. It was reasonable for the trial court to infer that defendant intended to cause great bodily harm by participating in a group beating of the victim. *Kanaan*, 278 Mich App at 622.

B. OVS 3 AND 7

[2] In this first section of the opinion, "defendant" refers to defendant Octavious Dean.

At sentencing, defense counsel objected to the scoring of OV 7, but not OV 3. Therefore, the challenge to OV 7 is preserved, and the challenge to OV 3 is not. See *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). We will affirm a defendant's sentence absent an error in scoring. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). A trial court's "factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). And "[a]n unpreserved objection to the scoring of offense variables is reviewed for plain error." *People v Odom*, 276 Mich App 407, 411; 740 NW2d 557 (2007). When scoring offense variables, a court cannot consider circumstances that are inherently part of the sentencing offense. *People v Glenn*, 295 Mich App 529, 535; 814 NW2d 686 (2012), reversed on other grounds by *Hardy*, 494 Mich 430 (2013).

1. OV 3

OV 3 considers physical injury to the victim. MCL 777.33. MCL 777.33(1)(c) states that scoring 25 points is proper when "[l]ife threatening or permanent incapacitating injury occurred to a victim." And MCL 777.33(1)(d) allows for scoring 10 points when "[b]odily injury requiring medical treatment occurred to a victim." Bodily injury has been held to encompass "anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence." *People v McDonald*, 293 Mich App 292, 298; 811 NW2d 507 (2011). When scoring OV 3, the trial court must score the highest amount of points applicable. *People v Houston*, 473 Mich 399, 407; 702 NW2d 530 (2005).

Here, the trial court properly assessed OV 3 at 25 points because defendant's actions caused the victim to sustain life-threatening injuries. The trial court determined that the victim was severely beaten by a group of men (that included defendants), who inflicted serious injuries upon him. The victim's testimony and his medical records demonstrated that the beating caused serious medical problems, including a fractured eye socket, broken nose, contusions, and broken ribs. These injuries required significant medical attention and a hospital stay. The trial court thus did not err when it assessed 25 points under OV 3.

2. OV 7

MCL 777.37(1)(a) states that OV 7 is scored at 50 points when "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." See *Hardy*, 494 Mich at 439-440. The statute, MCL 777.37(3), defines sadism to mean "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." Torture is "the act of inflicting excruciating pain, as punishment or revenge, as a means of getting a confession or information, or for sheer cruelty." *Glenn*, 295 Mich App at 533, reversed on other grounds by *Hardy*, 494 Mich 430. Excessive brutality has been determined to mean "savagery or cruelty beyond even the 'usual' brutality of a crime." *Glenn*, 295 Mich App at 533. Conduct designed to substantially increase fear is "conduct . . . designed to cause copious or plentiful amounts of additional fear." *Id.* at 533-534. Because "all crimes against a person involve the infliction of a certain amount of fear and anxiety," a court should determine what the baseline of fear and anxiety is for the charged offense and resolve whether defendant designed his conduct to substantially increase the fear and anxiety. *Hardy*, 494 Mich at 442 (internal

quotation marks and citation omitted). The conduct does not have to rise to the level of sadism, torture, or excessive brutality. *Id.* at 443.

Here, the trial court correctly assessed 50 points for OV 7 because: (1) defendant engaged in sadistic conduct (in the words of the trial court, the victim was "stomped almost to death"); and (2) defendant committed torturous acts in causing the harm. Defendant's actions were "savage" or "cruel" beyond what was necessary to commit the offense. *Glenn*, 295 Mich App at 533. Again, defendant participated in a group beating where the victim was punched, kicked, and stomped on for a period of about 20 minutes. And, as noted, the victim suffered serious injuries and spent at least two days in the hospital. This violence amounted to "savagery or cruelty beyond even the 'usual' brutality of a crime" and evinced a desire to "inflict[] excruciating pain . . . for sheer cruelty." See *Glenn*, 295 Mich App at 533. In addition, the trial court heard evidence that defendant's conduct was designed to substantially increase the victim's fear and anxiety. *Hardy*, 494 Mich at 442.

Accordingly, the trial court did not err when it scored 50 points under OV 7.

II. DOCKET NO. 316101

Defendant Rafeal Dean[3] asserts that the trial court: (1) erred when it scored his conduct under OV 3 and OV 7; and (2) violated his Sixth Amendment rights by engaging in judicial factfinding to increase a mandatory minimum sentence.

The trial court correctly scored defendant's conduct under OV 3 and OV 7. MCL 777.33(2)(a), the statute that governs OV 3, states that in "multiple offender cases, if 1 offender is assessed points for death or physical injury, all offenders shall be assessed the same number of points." Accordingly, the trial court did not err in assessing 25 points for OV 3 for defendant, because, as discussed above, defendant Octavious Dean was properly scored for 25 points under OV 3.

"[U]nlike OV 1, OV 2, and OV 3, OV 7 does not state that in multiple offender cases, if 1 offender is assessed points for the applicable behavior or result, all offenders shall be assessed the same number of points. For OV 7, only the defendant's actual participation should be scored." *People v Hunt*, 290 Mich App 317, 326; 810 NW2d 588 (2010) (internal quotation marks and citations omitted). This caveat does nothing to bolster defendant's argument, however, as his participation in the group beating also involved the same "savagery or cruelty beyond even the 'usual' brutality of a crime" discussed above. The trial court therefore correctly assessed 50 points for defendant's conduct under OV 7.[4]

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[3] In this second section of the opinion, "defendant" refers to defendant Rafeal Dean.

[4] We reject defendant's argument that he received ineffective assistance of counsel with respect to the scoring of OV 3 and OV 7. Counsel will not be deemed ineffective for failing to advance a meritless position or make a futile motion. *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011).

Nor did the trial court violate defendant's Sixth Amendment rights by engaging in judicial factfinding. Our Court explicitly rejected this argument in *People v Herron*, 303 Mich App 392, 405; ___ NW2d ___ (2013):

> We hold that judicial fact-finding to score Michigan's guidelines falls within the "'wide discretion'" accorded a sentencing judge "'in the sources and types of evidence used to assist [the judge] in determining the kind and extent of punishment to be imposed within limits fixed by law.'" [*Alleyne v United States*, 570 US ___, ___ n 6; 133 S Ct 2151; 186 L Ed 2d 314 (2013)], quoting *Williams v New York*, 337 US 241, 246; 69 S Ct 1079; 93 L Ed 1337 (1949). Michigan's sentencing guidelines are within the "broad sentencing discretion, informed by judicial factfinding, [which] does not violate the Sixth Amendment." *Alleyne*, 570 US at ___; 133 S Ct at 2163.

Affirmed.

/s/ Cynthia D. Stephens
/s/ Henry William Saad
/s/ Mark T. Boonstra